SUPREME COURT, U. S.
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No. 74-870

In the Supreme Court of the United States

OCTOBER TERM, 1974

GEORGE LAWSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Statutes and Rules 2

Questions Presented 3

Statement of the Case 4

Reasons for Granting the Writ 10

Argument 11

Conclusion 17

Appendices:

Appendix "A"—Opinion of Court of Appeals ....App. 1

Appendix "B"—Judgment of Court of Appeals App. 26

Appendix "C"—Order Denying Rehearing .....App. 27

TABLE OF AUTHORITIES CITED

Cases

Blatt v. United States, 3 Cir., 60 F 2d 481 12

Bruton v. United States, 391 U.S. 123 .....13, 14

Friedman v. United States, 8 Cir., 381 F2d 155 11

Holland v. United States, 348 U.S. 121 12

Holland v. United States, 10 Cir., 209 F2d 516 12

Korman v. United States, 7 Cir., 486 F2d 926 15

Langetta v. New Jersey, 306 U.S. 451 17

Mundy v. United States, D.C. Cir., 176 F2d 32 12

Nanfito v. United States, 8 Cir., 20 F2d 376 12

Schenks v. United States, D.C. Cir., 2 F2d 185 12

PAGE

United States v. Calandra, —— U.S. ——, 38 L.Ed.2d 561 15

United States v. Cardiff, 344 U.S. 174 17

United States v. Heft, 7 Cir., 413 F2d 1027 ..... 13, 14

United States v. Kwitek, 7 Cir., 433 F2d 18 14

United States v. Parks, 1 Cir., 411 F2d 1171 14

United States v. Reid, 7 Cir., 410 F2d 1223 14

Williams v. United States, 4 Cir., 271 F2d 703 11

Statutes

18 USC 3331 ..... 2, 15, 16, 17

18 USC 3332 ..... 2, 15, 16, 17

Federal Rules of Criminal Procedure

Rule 6 ..... 15, 17

Rule 30 ..... 11, 12

Others

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Webster's New World Dictionary of the American Language, College Edition, 1966 16

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Petitioner, George Lawson, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, sentencing the petitioner to one year imprisonment upon a jury's verdict of guilty of conspiracy to import cocaine and a substantive count of importation of cocaine.

OPINION BELOW

The opinion of the Court of Appeals is not reported, but is printed in the appendix to this petition (Appendix "A"). The opinion of the Court of Appeals was entered November 26, 1974. A timely Petition for Rehearing was denied by order entered December 19, 1974 (Appendix "C").

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1974 (Appendix "A"). A timely Petition for Rehearing was denied on December 19, 1974 (Appendix "C").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND RULES

18 U.S.C. 3331.

§ 3331. *Summoning and term*

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated, Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of

such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

18 U.S.C. 3332. *Powers and duties.*

• • •

"(b) Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled."

QUESTIONS PRESENTED

1. Is it reversible error in a federal court criminal jury trial for the court to refuse to instruct the jury on the definition of reasonable doubt when requested to do so by the defendant and said refusal is objected to?

2. Is a federal criminal defendant charged with conspiracy to import cocaine and importation of cocaine denied his rights to due process and a fair trial by jury by the trial court's denial of his motion for mistrial after the striking of testimony of a Drug Enforcement Agency agent and a government chemist and denying admission into evidence of approximately 480 grams of a substance identified as cocaine which had been exhibited to the jury for almost one-half of the trial?

3. Was the "special" grand jury which was the third of four such "special grand juries" then in existence in the Northern District of Illinois, illegally impaneled, thus invalidating the indictment?

STATEMENT OF THE CASE

Nature of the Case and Its Disposition

George Lawson was originally indicted in May, 1972, in the Northern District of Illinois, Eastern Division, along with seven others in Indictment No. 72CR398. That indictment charged the defendant, Lawson, with conspiring with the other defendants from April 20, 1971 to the filing of the indictment, to import cocaine into the United States. Lawson was also charged in a substantive count of actual importation in or about the latter part of April, 1971, or the early part of May, 1971. Lawson was not charged in the remaining counts of the indictment.

Lawson, who was continuously a resident of Jamaica during 1971 until his arrest upon his entry into Puerto Rico on October 24, 1972, was arrested upon his entry into Puerto Rico. Lawson, subsequently, attacked the indictment as being duplicitous since the statutes involved were amended on May 1, 1971, changing the penalties involved

and thus, an indictment charging a crime either prior to May 1, or after May 1, 1971, did not adequately apprise the defendant of the nature and cause of the charge against him.

The government in attempting to remedy the indictment, caused Indictment No. 73CR120 to be returned purportedly to supercede the substantive act count of Indictment 72CR398 only, charging that the alleged actual importation took place on or about May 9, 1971. Lawson continued to object to the conspiracy count of 72CR398 as being duplicitous and ultimately, the government caused the "Special September, 1972 Grand Jury" to return the instant Indictment No. 73CR389 which charges the petitioner, Lawson, in Count I with conspiracy to import cocaine into the United States from Jamaica and in Count II with actual importation of cocaine. (R. 1, A. 1) Indictments, 72CR398 and 73CR120 were dismissed as being superceded by 73CR389.

Lawson maintained his plea of "not guilty" and the matter was tried to a jury which returned verdicts of guilty on both counts of the indictment on December 12, 1973 (R56). On February 5, 1974, after denying Lawson's post-trial motions, the Court sentenced Lawson to one year imprisonment on each count, said sentences to run concurrently, the sentence on Count II to be followed by mandatory parole for a period of three years (R64).

Pleadings

Lawson filed numerous pre-trial motions including: Motion To Dismiss The Indictment (R10), Special Motion To Dismiss In The Nature Of A Plea In Bar, For Denial of Speedy Trial Contrary To The Constitution Of The United States And Rule 48, F.R. Cr.P. (R11), Motion For Discovery And For Production Or Inspection Or Copy

under Rule 16, F.R. Cr.P. (R12), Special Motion To Dismiss, etc. (R22), Motion To Dismiss For Lack Of Jurisdiction And Venue (R31). All of these motions were denied except that certain discovery was allowed (R15).

A jury was chosen and the trial began before the jury on December 10, 1973 (R46).

The Trial

The government's case consisted of the testimony of three witnesses—Richard Fox (Tr. 12-54), Lawrence Zaretsky (Tr. 55-98), and Myrna Pierce (Tr. 98-115). Each of these witnesses had originally been codefendants with the petitioner, Lawson, in this case, (originally Indictment 72CR398) and had pled guilty and received probation without any period of incarceration (Tr. 12, 46, 56, 80, 99, 113).

Fox and Zaretsky testified that in May, 1971, they were in Jamaica and while there, met Lawson (Tr. 14, 56-57). Subsequently, in the company of others they saw Lawson in a home at Pimento Cove in Jamaica.

Fox testified that on one of these visits, Lawson stated that he had cocaine for sale and wanted to know if Fox was interested in buying (Tr. 17).

Subsequently, Fox met Lawson and told him he would be interested if he did not have to put up any money and if it could be delivered (Tr. 21). Later the following day, Lawson told Fox the deal was acceptable (Tr. 22).

Fox further testified that before leaving Jamaica he once again stopped at Lawson's residence and there saw Lawson and Myrna Pierce. Fox stated Lawson was packing plastic bags of white powder into a cosmetic case (Tr. 26).

Fox then flew to Chicago. Zaretsky had already left. Zaretsky had flown to Miami, picked up Fox's car and drove it to Chicago (Tr. 62).

Fox and Zaretsky met in Chicago (Tr. 62-63) and went to a bank. Fox went in the bank and brought out an envelope full of money. Then they picked up Myrna Pierce at a hotel and Fox gave Myrna Pierce the money (Tr. 28, 29, 63, 64). However, prior to meeting Myrna Pierce, Fox testified that he went directly to the home of one Susan Shamberg in Chicago when he arrived and that he took out a plastic cosmetic case from the freezer (Tr. 27).

Fox, Zaretsky, DeCarolis, Bennett and Shamberg, apparently, thereafter met at Shamberg's house and mixed the powder in the cosmetic case with lactose (Tr. 66).

Zaretsky also testified over objection to dealing with agent Aurelio regarding sales of cocaine (Tr. 69-77).

Myrna Pierce testified that she knew Lawson and met Fox and Zaretsky at Lawson's residence in Jamaica in May, 1971 (Tr. 100). She further testified that Lawson asked her to take cocaine to Chicago for Fox, that she first declined and then later agreed (Tr. 101). Lawson packed the white powder in a cosmetic case and Fox gave her a number to call in Chicago. She flew to Baltimore and then to Chicago (Tr. 102). In Chicago she called Randy Fine, met her, and gave her the package (Tr. 103).

The following day, Fox and Zaretsky picked her up and Fox gave her an envelope of money (Tr. 104). She then flew back to Jamaica and gave Lawson the envelope. (Tr. 105). Later in June, 1971, she was with Lawson at Pimento Cove in Jamaica and saw Lydia Vasquez and David Bennett. Lawson stated "Rick had sent them down with the balance of the money." (Tr. 105)

The second day of the trial was taken up with the testimony of agent Aurelio and one Mark Cunningham, a government chemist. Aurelio's testimony concerned certain meetings with Zaretsky in Chicago when he purportedly bought packages of white powder which were identified as Government Group Exhibits 1 and 2 (Tr. 116-135). Cunningham's testimony was as an expert and was to the effect that the powder in Exhibits 1 and 2 was cocaine (Tr. 135-152). However, he further admitted that he could not tell whether the two exhibits came from the same source (Tr. 152).

The trial court sustained the objection to the proffered admission of the exhibits (Tr. 175) and thereafter struck the testimony of Aurelio and Cunningham (Tr. 190). However, the Court denied Lawson's motion for mistrial based upon the prejudicial effect of the jury having heard the testimony of Aurelio and Cunningham and having had packages of "cocaine" exhibited to them for the better part of a day (Tr. 190).

The government then rested (Tr. 195). The defendant's motion for judgment of acquittal was denied (Tr. 187). The Court then, at the defendant's request, read a paragraph of the government's bill of particulars that at all times during the alleged conspiracy, Lawson was in Jamaica (Tr. 196).

The defense then rested (Tr. 196) and the government rested in rebuttal (Tr. 196).

The defendant moved for judgment of acquittal at the close of all evidence which was denied (Tr. 218).

Conference was had on instructions wherein the petitioner specifically requested that reasonable doubt be defined to the jury and objected to the Court's declination so to do (Tr. 205-206).

Final arguments were had and the jury instructed.

Pursuant to Rule 30, the petitioner renewed his objections to the instructions as made during the conference and specifically objected to the failure to define reasonable doubt (Tr. 266).

The jury returned verdicts of guilty on both counts (R56).

Following denial of the petitioner's post-trial motions, Lawson was sentenced to one year's imprisonment on each count to be served concurrently with the provision that the sentence on Count II be followed by a mandatory three year parole (R64).

The cause was appealed to the United States Court of Appeals for the Seventh Circuit which affirmed Lawson's conviction by opinion issued November 26, 1974. (App. "A"). A timely Petition for Rehearing was then denied by order dated December 19, 1974. (App. "B")

REASONS FOR GRANTING THE WRIT

In this case the United States Court of Appeals for the Seventh Circuit has now established a rule within the Seventh Circuit which is in conflict with the rulings of the five other Circuit Courts of Appeals which have passed on the issue of refusal to define reasonable doubt to the jury when requested. The Seventh Circuit's opinion is also in conflict with dicta in opinions of this Court. This Court should resolve this conflict.

The issue of the special grand jury has not yet been considered by this court and involves an important federal question which this Court should resolve.

This Court should resolve the apparent conflict between the Seventh Circuit's opinion in this case and prior decisions of this Court and even the Seventh Circuit regarding the rights to due process and a fair trial by jury.

ARGUMENT

I.

IT IS REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON THE DEFINITION OF REASONABLE DOUBT WHEN REQUESTED.

Prior to the conference on instructions the defendant, Lawson, had submitted his requested instruction D (R.66) which included a definition of "reasonable doubt". This instruction was Devitt and Blackmar instruction §11.01 verbatim. The government had also tendered an instruction based on LaBuy instruction 6.01-3 defining reasonable doubt (Tr. 204). The trial judge then, over objection of the defendant and, in fact, the government as well, refused to instruct the jury on the definition of reasonable doubt (Tr. 206). The defendant, pursuant to Rule 30, F.R.Cr.P. again renewed his objection to this refusal to instruct after the giving of the charge and before the jury retired (Tr. 266).

Most circuits have held that:

> ". . . it is the duty of the Court to define and explain the meaning and application of 'reasonable doubt.'"
>
> *Williams* v. *United States* 271 F2d 703, 705 (4 Cir. 1959)

and:

> "In the first place, it was the Court's duty to instruct on the meaning of 'reasonable doubt' . . . and *failure to do so upon request would constitute error.*" (Emphasis added)
>
> *Friedman* v. *United States* 381 F2d 155, 160 (8 Cir., 1967).

Also see: *Holland* v. *United States* 209 F2d 516, 523 (10 Cir. 1954); *Blatt* v. *United States* 60 F2d 481 (3 Cir. 1932); *Nanfito* v. *United States* 20 F2d 376, 378 (8 Cir. 1927); *Schencks* v. *United States* 2 F2d 185 (DC Cir. 1924); *Mundy* v. *United States* 176 F2d 32 (DC Cir. 1949).

Clearly, the trial court's refusal to define reasonable doubt in its charge although requested so to do by the defendant, where defendant preserved his objection pursuant to Rule 30, F.R.Cr.P., constituted reversible error.

The Seventh Circuit has now held in its opinion contrary to what it terms the "federal rule". While the Seventh Circuit purports to recognize the decisions of the other circuits cited above, it chooses to disregard these decisions and even the dicta in this Court's decision in *Holland* v. *United States,* 348 U.S. 121 at 139. It now establishes its own rule regarding the informing of the jury of probably the most important legal concept in a criminal trial.

This Court should review the decision in this case and reverse the Seventh Circuit herein and once again establish uniformity in the federal courts in this most important area.

II.

THE DEFENDANT WAS IRREVOCABLY PREJUDICED BY TESTIMONY OF A DRUG ENFORCEMENT AGENCY AGENT AND A GOVERNMENT CHEMIST AND HAVING A LARGE AMOUNT OF "COCAINE" EXHIBITED BEFORE THE JURY, ALL OF WHICH SAID TESTIMONY AND "COCAINE" WERE INADMISSIBLE AND STRICKEN.

Except for the jury selection process and final arguments and instructions, the actual evidentiary part of the trial in this case lasted less than two days. The opening statements began at 2:00 P.M. on December 10, 1973 (Tr. 2) and both sides had rested by 3:00 P.M. on December 11, 1973 (Tr. 198).

Except for a brief cross-examination of one witness which takes up only six pages of transcript, the entire proceedings on the second day of trial consisted of the testimony of Aldo Aurelio and Mark Cunningham. Aurelio's testimony was simply an attempt to lay a foundation for the admission of Government's Group Exhibits 1 and 2 which were packages of white powder. Aurelio's testimony concerned his purchases of the two exhibits from Zaretsky.

Cunningham was qualified as an expert chemist and testified to his determinations that the exhibits were cocaine, together totalling slightly more than a pound (Tr. 135-152). During all of Aurelio's and Cunningham's testimony, the exhibits purportedly containing more than a pound of cocaine were on the prosecution table in front of the jury or were being exhibited to witnesses in view of the jury.

The trial court, subsequently, agreed that the government had failed to connect Exhibits 1 and 2 with Lawson and sustained the objection to the admission into evidence of the exhibits (Tr. 175). The Court also sustained Lawson's motion to strike the testimony of Aurelio and Cunningham and instructed the jury to disregard it (Tr. 195). However, the Court denied Lawson's motion for mistrial on the basis of the irrevocable prejudice caused by the testimony and exhibiting of the exhibits before the jury (Tr. 190).

The Seventh Circuit has held in *United States* v. *Heft* 413 F2d 1027, 1028, that it was "plain error" not to declare a mistrial where after evidence was admitted, it was then suppressed and the jury directed to disregard it. That opinion relied on the holding in *Bruton* v. *United States* 391 US 123 where at Page 129 it was stated:

> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which as a matter of law, they should not consider but which they cannot put out of their minds . . . the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . ."

The *Bruton* Court held that it could not "accept limiting instructions as an adequate substitute" for Bruton's Sixth Amendment right. This Court should not accept the trial court's limiting instructions as an adequate substitute for Lawson's constitutional right to a fair trial before an unprejudiced jury.

Also see *United States* v. *Kwitek* 433 F2d 18 at 20 (7 Cir. 1970); *United States* v. *Reid* 410 F2d 1223 at 1226 (7 Cir. 1969); *United States* v. *Parks* 411 F2d 1171 at 1172-1173 (1st Cir. 1969). Nothing is more prejudicial to a defendant in the eyes of a jury than a large quantity of a "narcotic drug". It was impossible for the jury to disregard the testimony of Aurelio and Cunningham and the exhibition of Government Exhibits 1 and 2. The trial court's denial of the petitioner's motion for mistrial required reversal.

Clearly, the petitioner was denied due process of law and more particularly the fair trial by a jury which was untainted by the extremely prejudicial testimony of Aurelio and Cunningham and the exhibition of a large quantity of "cocaine" in a case where "cocaine" was the essence of the case.

The Seventh Circuit's artificial distinctions in its opinion in this case of the facts herein and the holdings in other cases such as *Heft, Kwitek,* and *Reid* should not be allowed to stand.

III.

THE SPECIAL SEPTEMBER GRAND JURY WAS ILLEGALLY IMPANELED AND THUS THE INDICTMENT HEREIN WAS INVALID.

The Special September, 1972 Grand Jury which returned the indictment in this case, was the third of four such "Special Grand Juries" then in existence in the Northern District of Illinois. This "Special Grand Jury" had been created pursuant to the provisions of 18 USC 3331 and 3332(b).

While petitioner was aware of the Seventh Circuit's previous decision in *Korman* v. *United States* 486 F2d 926 (7 Cir. 1973) holding that the provisions of 18 USC 3332(b) do not restrict the number of Special Grand Juries to two, he suggested that the decision in the *Korman* case was erroneous and, in fact, not necessary to the decision in that case. It might be pointed out that the "Special Grand Jury" in the *Korman* case was, in fact, the second "Special Grand Jury" to be impaneled in the Northern District of Illinois at the time and thus, clearly permissible by the terms of 18 USC 3332(b). In addition, the *Korman* case was an action brought by a grand jury witness attacking the validity of the grand jury. The United States Supreme Court has held that a witness does not usually have standing to attack the grand jury. (*United States* v. *Calandra* ..... US ..... 38 L.Ed.2d 561, 570).

Clearly, however, a defendant in an indictment does have the right to challenge the grand jury which returned that indictment, and that was done by this petitioner (R. 10) (Rule 6(b) 1 and 2, F.R.Cr. P.).

The Seventh Circuit recognizing this argument nevertheless chooses to follow its prior decision in *Korman*.

The Court is directed to the language of 18 USC 3331 and 3332. It is argued that, clearly, from the provisions of these statutes, no more than two "Special Grand Juries" may be impaneled in any District at one time.

18 USC 3331(a) provides for the authority to the District Court to impanel one special grand jury "unless another special grand jury is then serving".

18 USC 3332(b) provides that "whenever the District Court determines that the volume of business of *the* special grand jury exceeds the capacity of *the* grand jury to discharge its obligations, the District Court may order *an* additional special grand jury for the District to be impaneled." (Emphasis added.)

The definition of "an" is "one", according to dictionaries. (See Black's Law Dictionary, 4th Edition, and Webster's New World Dictionary of the American Language, College Edition, 1966.)

In other words, it is argued that pursuant to 18 USC 3331, the District Court is entitled and, in fact required, to impanel one special grand jury during each 18-month period, but only if no other special grand jury is then serving. Under 18 USC 3332(b), if the Court finds that certain circumstances then exist, the District Court may impanel one additional special grand jury. The Statutes permit only two special grand juries to be impaneled within a District at any one time.

Since the Special September, 1972 Grand Jury was the third special grand jury to be impaneled within the Northern District of Illinois at the same time, then the impaneling of the Special September 1972 Grand Jury was illegal and contrary to Statutes. (This Court may take judicial notice of the fact that the Special September, 1972 Grand

Jury was the third special grand jury to be impaneled at the same time according to the records of the District Court, this Court, and stipulations of the government in the District Court and this Court heretofore.)

It should be pointed out that the Special Grand Juries created under 18 USC 3331 and 3332 are purely statutory creatures designed to serve particular purposes and given additional powers including the powers to file reports and to be extended up to 36 months and longer, and thus, are far different from the Rule 6 (F.R.Cr.P.) Grand Juries which are a derivation from the English grand jury. The law is clear that when a Statute deviates from the common law, particularly penal statutes, it must be strictly construed. (See 50 Am. Jur. §402, *Langetta* v. *New Jersey*, 306 US 451, 59 SCt. 618; *United States* v. *Cardiff* 344 US 174, 97 LEd 200, 73 SCt. 189.)

The Special September, 1972 Grand Jury was impaneled contrary to the authority and provisions of the Statute, was unlawfully impaneled, and thus, its indictment in this case was invalid and must be dismissed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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